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April 5, 2002

Via Electronic Filing

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Triennial Review Comments - CC Docket Nos. 01-338, 96-98, and 98-174

Dear Ms. Salas:

Pursuant to the Commission's Public Notice in this proceeding, IP Communications ("IP") hereby provides these comments. Due to resource constraints and because the Commission has incorporated within these dockets a number of proceedings where IP has already provided specific and detailed comments, for these initial comments IP attaches its prior comments in the prior related proceedings for the convenience of Commission staff and briefly discusses issues relating to the general inquiries within the notice. In IP's reply comments, it is anticipated that more of a point-by-point reply consistent with the sequencing within the NPRM will be prepared.

Positions Previously Presented by IP

As evidenced by IP's attachments to these comments, IP has devoted substantial resources to issues relating to broadband deployment and the necessity for competitive and economic access to facilities. The attached comments, which are incorporated herein as if set forth at length, from related proceedings, most of which have been incorporated into this proceeding are as follows:

- IP's Comments on 5th Notice, dated October 12, 2000;
- IP's Reply Comments on 5th Notice, dated November 14, 2000;
- IP's Comments on 6th Notice, dated February 27, 2001;
- IP's Comments on HiCap Petition, dated June 5, 2001;
- IP's Comments on "Broadband Nondom Petition", dated March 1, 2002; and
- IP's Reply Comments on "Broadband Nondom Petition" dated April 1, 2002.

Conceptual Issues Queried in the NPRM

As stated above, many of the issues addressed in the NPRM have already been addressed by IP in the above-listed comments that have been incorporated herein. However, it is important to address, at least at a high-level, the specific conceptual inquires as they relate to the "necessary" and "impair" standards and broadband deployment.

First and foremost, incumbent local exchange carrier ("ILEC") claims regarding their need for regulatory relief are disenginuine, at best. Using SBC Communications, Inc. ("SBC"), as an example, the Commission has been notified on numerous occasions and in numerous contexts that SBC explained to its investors that all of its costs for deploying Project Pronto and other network upgrades would more than be paid for in maintenance costs savings over a four-year period. This was without any rewriting of the FTA or the FCC's unbundling rules. Similarly, SBC initiated deployment without any form of regulatory protections being a prerequisite. Moreover, this Commission made it perfectly clear to SBC when it provided a limited waiver to SBC for it to be able to own certain equipment as part of Project Pronto that nothing in that order limited a CLEC's right to seek unbundled access to those facilities. With that clear FCC position in mind, SBC continued to deploy Project Pronto. And, even in Texas where Project Pronto facilities have been ordered in arbitration to be unbundled on and end-to-end basis, SBC continues to deploy Project Pronto. It is not surprising that large ILECs seek special exclusions from their unbundling obligations for deployment they are doing anyway. As such, the Commission must take a critical view of their claims. Also, it is important to note that there is a perfect 3 for 3 of the state commissions, which have reached a substantive decision regarding unbundling obligations applying to next generation digital loop carrier ("NGDLC"), in favor of unbundled access, Texas, Wisconsin, and Illinois (on rehearing).

Second, ILECs received a substantial tax incentive to deploy broadband facilities when President Bush signed the economic stimulus package last month. With the tax incentives in hand, even if additional investment incentives were necessary, the ILECs have already received them.

Third, the proper way to address issues relating to cost recovery is within the existing framework of the Commission's rules. For example, ILECs have suggested that there is a "risk factor" to deployment of facilities that are broadband capable. The best example of a "risk factor" would likely be the pharmaceutical industry. In pharmaceuticals, a company may have to expend resources for research and development on four products to obtain one approved and marketable drug. Although IP does not see that such an analysis is appropriate here, IP does believe that an ILEC could make an argument that research and development costs for "failed" projects that were prudently investigated, could be recoverable as an amortized regulatory asset as part of the ILEC's common cost factor. As a result, the ILEC would have the ability to recover a portion of the costs of such failed projects through its unbundled network element ("UNE") rates. This result not only meets the ILEC's stated goal by providing a layer of insulation for risks prudently undertaken but also provides that benefit in a technology neutral manner that is not limited to "broadband" and would not have an exclusive effect in the DSL marketplace.[1]

Fourth, many of the conceptual queries regarding the "necessary" and "impair" standard appear to create substantially increased regulatory burdens and can be subject to abuse.[2] A CLEC and an ILEC could be forced to have numerous arbitrations relating to unbundled access to the same UNE in slightly varied contexts. Although such repeated and costly arbitration would be an annoyance to ILECs, it would certainly overwhelm state commissions whose resources are already stretched and would likely lead to the death of a thousand cuts to many if not most competitive local exchange carriers ("CLECs"). Moreover, using history as a guide, e.g. UNE-P, shared transport, dark fiber, line splitting over ILEC-owned splitters where it has been ordered by the state commission, etc., **ILECs are quite adept at parsing what they will call a relevant distinction to refuse CLEC unbundled access based on nuances that will likely be distinctions without difference.**

Fifth, one cannot lose sight of the fact that we are dealing predominantly with last mile facilities. It simply is neither in the public interest or economically practical to expect CLECs to replicate substantial ILEC facilities in the loop plant. There are tremendous economies of scale in shared loop plant and if there were substantial and effective competitive opportunities on other networks for CLECs to provide broadband services, ILECs would be seeking to entice CLECs to use their loops, not setting up roadblocks. This again evidences the lack of ubiquitous competition and the need for continued unbundled access.

Sixth, a couple of telling points are contained in SBC's own comments in CC Docket No. 01-337, *Review of Regulatory Requirements Incumbent LEC Broadband Telecommunications Services.* SBC, for example, argues that it cannot exert market power over competitors by virtue of its ownership of wireline facilities and that cable providers are its chief broadband rival. Yet, this Commission determined that ILECs acted anticompetively by refusing to allow CLECs to line-share when they allowed the equivalent sharing to take place between their voice and data products. Also, when referencing cable as their chief rival, SBC implicitly pointed to the fact that it has garnered over 90% of the DSL market in its territory. Anticompetitive conduct like the failure to line-share and the manipulation of the regulatory process to garner at or near 100% of the market over NGDLC facilities have created this dominant DSL position and shows the effects of market power and successful exclusionary tactics.

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[1] In other words, ILECs would be required to provide unbundled access but would also have the benefit of those same CLECs to share in the costs.

[2] It is rather ironic that at the same time that ILECs would seek to impose such extreme and possibly crippling regulatory burdens on CLECs, ILECs seek relief from far less onerous tariff filing requirements as "needed" regulatory relief (See FCC docket 01-337).

In this context, consider the following:

- It has been over two years since IP and others discussed the necessity of unbundled access to NGDLC as part of the FCC's merger waiver proceeding;
- It has been over a year and a half since the 5th Notice was issued; and
- It has been over two years since IP brought what became a successful line sharing/NGDLC unbundling proceeding to the Texas PUC.

ILECs, like foxes in a hen house, have used the intervening time to squelch most of their DSL competition only to shamelessly admit the results (that cable companies are now their chief broadband rivals) as part of a request to further "deregulated" the foxes.

Finally, in those same SBC comments, SBC suggests that its cost to provide residential broadband is $86 per customer per month, yet its price for residential DSL is $49.95 per customer per month according to the SWBT website. IP will leave the determination to the Commission as to whether this is a clear admission of predatory conduct by a dominant provider, which has been a significant cause to the economic instability of most of its DSL competitors.

IP appreciates the opportunity to provide these initial comments including the attached comments previously provided by IP in other proceedings. The unfortunate pattern has been that as competitors find a means to begin what could evolve into effective competition, that means of competition falls subject to an all-out assault by ILECs. Whether in the context of competition in the form of DSL, or UNE-P before it, this conduct is nothing other than bad faith on the part of ILECs. At some point, this Commission must take a very strong look at these practices by ILECs and make a determination as to what larger remedy is necessary if the ILECs cannot be trusted to be both a competitor and a supplier that values its wholesale customers.

Sincerely,

Howard J. Siegel
Vice President of External Affairs and
Regulatory Policy
IP Communications

STATE OF TEXAS)
)
COUNTY OF TRAVIS)

AFFIDAVIT OF HOWARAD SIEGEL
ON BEHALF OF IP COMMUNICATIONS

Before me, the undersigned authority, on this ____ day of April, 2002, personally appeared Howard Siegel, who, upon being duly sworn, states the following:

1. My name is Howard Siegel. I am over the age of 21, of sound mind, and am competent to testify as to the matters stated herein. I am the Vice President of External Affairs and Regulatory Policy for IP Communications ("IP"). I have personal knowledge of the facts contained herein.

2. The facts contained in these comments and related attachments are accurate. Moreover, I have personal knowledge as to this information through the due course of my duties in my capacity as IP's Vice President of External Affairs and Regulatory Policy.

Further Affiant sayeth not.

__________/s/__________________________
Howard Siegel

Sworn to and subscribed to before me this ____ day of April 2002, to certify which witness my hand and seal.

_________/s/_________________________
Notary Public in and for the State of Texas
My Commission expires:______________